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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutional due process and fair trial guarantees are violated by requiring a jury trial in a "hometown" forum where defendants are forced to choose between (1) an unrepresentative jury where the most qualified jurors are systematically excluded and (2) a biased jury.

2. Whether the constitutional due process and fair trial guarantees are violated by requiring a jury trial in a forum that has both a local interest bias and an economic interest in the outcome of the trial.

3. Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering public interest factors that indirectly promote competition in assessing any competitive impact of league controls of franchise locations.

4. Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering the pro-competitive benefits in the local market abandoned by the team seeking to move and may only consider the asserted pro-competitive benefits in the local market to which the team seeks to move.

5. Whether a sports league by-law specifying where the league's teams will conduct the league's business operations can be found to violate Section 1 of the Sherman Act.

PARTIES BELOW

Petitioner is the Oakland-Alameda County Coliseum, Inc., a non-profit corporation that operates a sports and enter-

tainment facility, including an outdoor stadium in Oakland, California.*

Respondents are the Oakland Raiders, Ltd., a member club of the National Football League and a former tenant of the Oakland Coliseum, and the Los Angeles Memorial Coliseum Commission, which operates a stadium and other athletic facilities in Los Angeles, California similar to those operated by petitioner.

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*The National Football League (NFL) and 27 of its 28 member clubs were defendants in the action. Those clubs are: Baltimore Football Club, Inc. (Indianapolis Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Foot Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Empire Sports, Inc. (Denver Broncos); San Francisco Forty-Niners; Seattle Professional Football; St. Louis Football Cardinals Company; and Tampa Bay Area NFL Football, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 726 F.2d 1381 (9th Cir. 1984) and appears as Appendix A, pp. 1a-52a. The order of that court denying a timely petition for rehearing and suggestion for rehearing en banc appears as Appendix F, pp. 102a-103a. The opinion of the District Court holding that the NFL location agreement is, as a matter of law, a conspiracy among independent business competitors within Section 1 of the Sherman Act, is reported at 519 F.Supp. 581 (C.D. Cal. 1981) and appears as Appendix B, pp. 53a-60a. The District Court's initial order denying the motion of petitioner and the National Football League for a change of venue is reported at 89 F.R.D. 497 (C.D. Cal. 1981) and appears at Appendix C, pp. 61a-96a. The March 1, 1982 order of the Court of Appeals denying the Oakland Coliseum and the National Football League's petition for a writ of mandamus on the venue issue appears as Appendix D, pp. 97a-99a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 28, 1984. A timely petition for rehearing and suggestion for rehearing en banc was filed and was denied by that court in an order entered on June 19, 1984. Jurisdiction in this Court is founded upon 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Sherman Act, 15 U.S.C. Section 1 (1982), provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Venue in federal court proceedings is governed in part by 28 U.S.C. Section 1404(a), which provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

The Oakland-Alameda County Coliseum, Inc. (Oakland Coliseum) is a nonprofit corporation that operates the Oakland-Alameda County Coliseum Complex pursuant to an agreement with the City of Oakland and the County of Alameda.[1] The Oakland Coliseum Complex includes an outdoor stadium that was the home of the Oakland Raiders from 1966 through 1980.

The Oakland Coliseum was constructed from 1964 through 1966 at a cost of over $26 million. The construction was financed by the sale of bonds whose repayment was guaranteed by the general funds of both the County of Alameda and the City of Oakland. Repayment of the bond obligations is approximately $1.5 million per year until 2004.

The American Football League and the Oakland Raiders, one of its original members, were without a home field in Oakland in 1960 and 1961, their first two years of existence. The City of Oakland, anticipating construction of the Oakland Coliseum, responded to the urgings of the AFL and the Raiders to establish a home field in the East Bay and (1) built the Raiders a temporary stadium at Youell Field in Oakland, and (2) then built the Oakland Coliseum, the Raiders' permanent home.

The Oakland Coliseum, knowing that franchise relocations were subject to League approval, relied on the rule requiring League approval before a franchise could be

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[1]There are *~~sixteen~~ cities* within Alameda County.

moved. The Oakland Coliseum and the taxpayers of Oakland and Alameda County built the Raiders a permanent home, guaranteed by over 60 million dollars in bond payments through the year 2004. The NFL, after its merger with the AFL, assumed the obligations of the AFL. The NFL Constitution and By-Laws contains Rule 4.3:

> "The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each club. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, *without prior approval of three-fourths of the existing member clubs of the League.*" (Emphasis added.)

From 1966 through 1980, the Oakland Raiders were one of the best supported and most successful franchises in professional football. The Oakland community supported the Raider team with 12 years of consecutive sellout crowds for their home football games during both the preseason and regular season.

In 1978, the Los Angeles Memorial Coliseum Commission (Los Angeles Coliseum) commenced this action against the NFL and all 28 of its member clubs, including the Oakland Raiders, claiming Section 4.3 of the National Football League's Constitution and By-Laws, requiring three-quarters of NFL members to approve any transfer of a franchise location, was illegally preventing it from obtaining an unspecified NFL team as a tenant. From 1978 until 1980, the Raiders, represented by NFL counsel, defended the validity of Section 4.3.

From 1979 into early 1980, the Los Angeles Coliseum and the Raiders secretly negotiated the move of the Raiders' franchise to Los Angeles. In January 1980, the Raiders publicly announced their intention to abandon Oakland and

unilaterally relocate in Los Angeles without seeking the required approval under Rule 4.3.[2]

REASONS FOR GRANTING THE WRIT

The Oakland Coliseum's Petition raises critical venue and antitrust issues that require resolution by this Court.

A. Venue

This highly publicized and sensational case, pitting Northern California interests against Southern California interests, ended when a Southern California jury held that it was unlawful for the National Football League to insist that the Oakland Raiders, one of the league's most successful and profitable franchises, remain an Oakland franchise.

Although the Oakland Coliseum and the NFL objected to having a Southern California jury hear the case, the trial court insisted the case be tried in Los Angeles. The trial court ignored the common perception, even among Los Angeles-area residents, that a trial of this issue in Los Angeles would not be fair to either Oakland or the National Football League.

Moreover, the trial of this case focused on the alleged deficiencies of the Oakland Coliseum as a site for a major league football team. In a very real sense, the Southern California jury was asked to decide, under the guise of an antitrust case, whether Los Angeles or Oakland was the better place for a football franchise to be located and, in addition, whether the Los Angeles Coliseum, a local public entity subsidized by local taxpayers, would benefit from obtaining such a franchise.

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[2]The Oakland Coliseum incorporates by reference the Statement of the Case submitted by the National Football League in its concurrently filed Petition for Writ of Certiorari.

1. The Oakland Coliseum and the NFL Were Denied a Representative Jury

In *Thiel v. Southern P. Co.*, 328 U.S. 217, 220 90 L.Ed. 1181 (1946), this Court commented:

> "The American tradition of trial by jury, considered in connection with either criminal or civil procedures, necessarily contemplates an impartial jury drawn from a cross-section of the community."

If it is impossible to select an impartial jury in a forum, a change of venue must be granted. *See, Groppi v. Wisconsin*, 400 U.S. 505, 510-511, 27 L.Ed.2d 571 (1971). The reasoning of *Groppi* is equally applicable where local prejudice makes it impossible to select an unbiased *representative jury.*

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04, 33 L.Ed.2d 83 (1972).

When the trial court insisted that this case be tried in Los Angeles rather than in a neutral district, the Oakland Coliseum and the NFL were forced to choose between two unconstitutional results—a biased jury or the systematic exclusion of a significant segment of the community. Constitutional principles can never be reconciled with the Hobson's choice given the Oakland Coliseum and the NFL of selecting either an impartial *or* a representative jury; the Oakland Coliseum and the NFL had a constitutional right to both.

The make-up of the jury should assure an "accurate application of the common sense of the community." *Ballew v. Georgia,* 435 U.S. 223, 234, 55 L.Ed.2d 234 (1978). This guarantee is especially important in a trial like this where the jury is asked, under the most generalized instructions, not so much to resolve disputed questions of fact as to make a fundamental value judgment: Is it "reasonable" for a sports league to require an established team to remain in its home community?[3]

The principal reason for the NFL's Rule 4.3 is the business benefits derived from franchise stability and fan loyalty. The success of the NFL and each of its teams is built on fan interest and loyalty, an emotional state that only sports fans can truly appreciate. Yet it was precisely this "segment of the community" which was systematically excluded from the jury.

Although football fans represent 38.9 percent of the Los Angeles general public and made up 45 percent of the original venire, all were excluded from the jury. There is no doubt that this exclusion of football fans was "systematic." The statistics speak for themselves: 77 percent of the jurors who said they were football fans were excused for cause, the overwhelming majority for bias. As a direct consequence of this exclusion of fans, there was a grossly disproportionate reduction of the chance of having men also on the jury. The exclusion of football fans affected five times more men than women.

An individual jury need not be a perfect mirror of the community. But that rule has no application to the systematic exclusion of identifiable segments of the community. *Duren v. Missouri,* 439 U.S. 357, 366, 58 L.Ed.2d 579 (1979).

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[3]Since the Raiders would be in a market that had two NFL teams wherever they operated, the competition effect of requiring the Raiders to continue in Oakland or move to Los Angeles was neutral. *See,* part B. 2, pp. 16-17, *infra.*

Here, the deviation from community norms was no accident. The fact that the jury had no football fans or men was not simply chance. It was preordained by insistence on trial in Los Angeles.

A rule expressly excluding Roman Catholics, blacks, Democrats, women or any other specifically identifiable segment of the community, would be unconstitutional on its face. The *de facto* effect of systematic exclusion of a representative segment of the community is equally unconstitutional. Football and sports fans, a readily identifiable segment of the community, should not have been excluded.

The overwhelming irony is that a simple change of venue to any locale other than Southern California or Northern California would have solved these constitutional problems with no prejudice to the Plaintiffs. If the case had been tried in Boise, Phoenix, Chicago, Des Moines, Atlanta or virtually any other city, sports and football fans would not have been biased in favor of the possibility of a Raider move to Los Angeles and would not have been challenged or excused for cause. The Oakland Coliseum and the NFL would have had a trial before a fair, impartial and representative jury.

The fact that the exclusion of a segment of the community resulted from the removal of biased jurors does not make that exclusion constitutionally legitimate. Any device violates the guarantee of a representative jury when "its conceded systematic impact is that only a very few [members of a cognizable group], grossly disproportionate to the number of eligible [group members] in the community, are called for jury service." *Taylor v. Louisiana,* 419 U.S. 522, 525, 42 L.Ed.2d 690 (1975). As this Court said many years ago:

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are under-

> mining processes and weakening the institution of jury trial, and should be sturdily resisted."

Glasser v. United States, 315 U.S. 60, 86 L.Ed. 680 (1942). *See also, Labat v. Bennett,* 365 F.2d 698, 724 (5th Cir. 1966) (en banc), *cert. denied,* 386 U.S. 991 (1967).

Oakland and the NFL were not entitled to a jury comprised of only sports fans, but sports fans cannot be systematically excluded.

Certiorari should issue whenever necessary to preserve the constitutional guarantee of trial by jury even from technical impairments. *See, Theil v. Southern P. Co., supra,* 328 U.S. 217; *Dairy Queen v. Wood,* 369 U.S. 469, 470, 8 L.Ed. 2d 44 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501, 3 L.Ed.2d 988 (1959). This guarantee includes the right to a trial by representative jury. This case involves an important denial of that right. Certiorari should be granted.

2. Los Angeles Jurors Should Have Been Disqualified for Their Financial Interest in the Verdict

Forcing the Oakland Coliseum and the NFL to try this case before jurors who had an economic interest in their verdict was a denial of due process under the Fifth Amendment. Courts have long recognized that a finder of fact with an interest in the outcome of a trial cannot meet the constitutional requirement of impartiality. *Withrow v. Larkin,* 421 U.S. 35, 47, 43 L.Ed.2d 712 (1975); *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 21 L.Ed.2d 30 (1968); *Chestnut v. Ford Motor Company,* 445 F.2d 967 (4th Cir. 1971).

Thus, when a judge, as fact finder, has an interest which would offer a *possible* temptation to the average man ". . . not to hold the balance, nice, clear and true . . ." his service as the finder of fact constitutes a denial of due process. *Ward v. Monroeville,* 409 U.S. 57, 60, 34 L.Ed.2d 267 (1972)

quoting Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749 (1927).

Moreover, courts have long recognized that appeals to the pecuniary interest of jurors are improper. *See, Epperson* v. *United States,* 490 F.2d 98 (7th Cir. 1973).

Half the jury were property owners and taxpayers in Los Angeles County. These jurors had a direct financial interest in the verdict for Los Angeles and the evidence inevitably created a "possible temptation" for those jurors to vote in favor of their pocketbooks. During both trials, counsel for Plaintiffs repeatedly highlighted the significant economic gain to Southern California in obtaining the Oakland Raiders. It was uncontradicted that the mere presence of a professional football franchise in a community would draw ***millions*** of dollars into the local economy, preventing the possibility of a financial burden on local taxpayers.

In this era of economic stress jurors are especially sensitive to economic arguments. In fact, even before the massive publicity generated by the retrial, 40 percent of the prospective jurors believed that an NFL team in the Coliseum would mean significant economic benefits for the Los Angeles area and its residents.[4] CR 1025 at 12, 100.

Plaintiffs recognized the importance of appealing to the jury's financial interest as taxpayers and called Kenneth Hahn, a senior member of the Los Angeles County Board of Supervisors, who told the jury the presence of the

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[4]Because of voir dire's well-known tendency to produce self-justifying answers, *Irvin v. Dowd,* 366 U.S. 717, 728, 6 L.Ed.2d 751 (1961), CR 893 at 18-19, questionnaire answers undoubtedly understate the real extent of perceived financial interest. For example, an opinion survey conducted prior to the second trial indicates that 49 percent of Los Angeles County residents "strongly" agreed and 35 percent agreed "somewhat," for a total of 84 percent, that Los Angeles would benefit economically from the Raiders' move. Such a jury pool cannot be considered to be unbiased and impartial.

Raiders in the Los Angeles Coliseum was critical to the economic well being of the County of Los Angeles.[5]

To make sure the jury understood the economic impact of a vote for the Plaintiffs, William Robertson, Commissioner for the Los Angeles Coliseum, testified that it was necessary to have the Raiders

> ". . . to generate enough money so that [the Los Angeles Coliseum] will not be a burden on the taxpayers . . ." 16 TR.2d 3182.

The Southern California taxpayers on the jury therefore could not avoid "a possible temptation" to vote in Plaintiffs' favor without disregarding the direct, uncontradicted testimony of both Hahn and Robertson that the verdict would affect them as taxpayers.[6]

The well-settled rule against jurors deciding a case in which they have a financial interest is based upon experience which "teaches that the probability of actual bias on the part of the judge or the decision maker is too high to be constitutionally tolerable . . . [in a case] in which the adjudicator has a pecuniary interest in the outcome . . ." *Withrow v. Larkin, supra,* 421 U.S. at 47.

This Court has followed the rule that the "slightest pecuniary interest" by the fact finder is sufficient to require disqualification. *Tumey v. Ohio, supra,* 273 U.S. at 524-531.

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[5]Indeed, counsel for both the Los Angeles Coliseum and the Raiders expressly *conceded* the fact that Los Angeles taxpayers would benefit from the Raiders' move. 2 TR.2d 85-86.

[6]A survey of the Los Angeles area taxpayers revealed that when they were told of the financial benefit resulting from the Raiders' move, there was a dramatic shift of opinion towards the Los Angeles position. CR 1025 at 6, 10-11.

Here the constitutionally impermissible economic interest clearly tainted every Los Angeles juror that decided the case.[7]

Los Angeles' claim that the stake of an individual county taxpayer in the outcome of this action was too small to be grounds for disqualification conflicts with previous decisions of this Court. The "requirement of neutrality has been jealously guarded by [this Court]." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L.Ed.2d 182 (1980). For example, it is equally unlikely that a mayor would be influenced by the effect that a $50 or $100 fine might have on a city's finances. In *Ward v. Village of Monroeville, supra*, 409 U.S. 57, this slight economic interest required disqualification as a matter of law.

The test is not actual bias, but the existence of the "slightest pecuniary interest" that offers a "possible temptation" to the average man. *Tumey v. Ohio, supra*, 273 U.S. at 524, 532. The pecuniary interest of Los Angeles County taxpayers in this case was far more substantial than the financial temptations facing the public officials in *Ward* or *Tumey*.

The economic interest of the Southern California jurors —intentionally magnified by the evidence presented to it— clearly created the existence of probable bias against the Oakland Coliseum and the NFL, depriving them of the right

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[7]The State of California has legislatively recognized that an appearance of bias exists when a dispute involving a local agency is resolved by a jury of its own taxpayers. California Code of Civil Procedure Section 394(1) requires that actions brought by a county, city or local agency against nonresidents of that county or city must be tried in a neutral county. Thus, had this case arisen in a California State Court, under Section 394(1) Oakland and the NFL would have had an automatic right to change venue to a neutral county since the Los Angeles Coliseum is a local agency. Federal courts should not disregard so clear a statutory public policy furthering impartial justice.

to a financially impartial jury guaranteed by the Constitution. The trial court had no discretion to abridge that guarantee. The Constitution protects against a probability of bias; actual bias need not be shown. *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed.2d 424 (1965); *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3rd Cir. 1965).

B. Antitrust

1. The Courts Below Precluded the Jury from Considering the Public Interest Factors That Indirectly Promote Competition in Assessing Any Competitive Impact of League Controls of Franchise Locations

The Oakland Coliseum and the NFL requested that the trial court instruct the jury regarding the public service aspects of the application of Rule 4.3 to the proposed transfer of the Oakland Raiders franchise to Los Angeles. They requested that the Court instruct the jury that:

> "The antitrust laws recognize that certain . . . businesses . . . have public service aspects which require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently . . .
>
> . . .
>
> . . . If you determine that Rule 4.3, as applied in this case, serves the public interest, and furthers the League's public service obligations, you should take that into account in assessing its reasonableness under the antitrust laws . . ."

See, Goldfarb v. Virginia State Bar, 421 U.S. 773, 787, n.17, 44 L.Ed.2d 572, 585 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 55 L.Ed.2d 637 (1978); *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1977).

The trial court rejected that requested instruction.

The facts before the jury were clear. At the urgings of the Oakland Raiders and the League, the Oakland Coliseum had been constructed. The construction of the Coliseum was a major community (sixteen cities) undertaking committing Alameda County taxpayers to a multi-million dollar debt service into the twenty-first century. The public investment in, and construction of, the Oakland Coliseum produced competitive benefits by increasing competition in Northern California in professional football and other professional sports. The investment in the Oakland Coliseum was undertaken in reliance on the promise of the League that the Raiders would not be moved if they were given reasonable support in Oakland.

The NFL's refusal to approve the Raiders' abandonment of Oakland was based on its concern for the public interest aspects of stable franchises in communities where the League had been given strong support by public investment in stadia facilities and strong support from local fans. The NFL had not approved a transfer outside a "home territory" in 20 years; the League believed a policy of loyalty to communities was good business and would obviously promote the League's overall interests, goodwill, public investments in stadia for NFL teams, and the public's sense of fairness in their perception of how the NFL treats communities who invest millions in its business. Many cities throughout the United States subsidize the NFL's business by building public stadia.

These facts presented strong public service factors that indirectly promoted competition and justified the application of the NFL's Rule 4.3 in the context of the Raiders' proposed move. Indeed, Oakland and the Alameda County communities were obligated to a multimillion dollar bond commitment to the benefit of the Raiders that stretched over 40 years. The NFL was committed in fairness to protect the various communities' investment in *its*—the NFL's —business.

This Court has made its views clear on the public service aspects of the antitrust laws on numerous occasions.

In *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56-57, n.20, 70 L.Ed.2d 810 (1982), Justice Brennan noted the standard for antitrust liability involving actions by local government. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417, n.48, 55 L.Ed.2d 364 (1978), Justice Brennan previously had stated that certain business activities—while otherwise anticompetitive in nature—require a different analysis when the activity is conducted in the public's interest.

In any antitrust action involving public interest considerations, it is crucial that the jury be instructed regarding the weight and appropriateness of such considerations to a "rule of reason" analysis. The trial court's refusal to instruct the jury that public service factors related to public investment in facilities for professional sports leagues are "rule of reason" benefits left the jury with a distorted impression of the antitrust standards it was to follow. Public service evidence was the key justification for the NFL enforcing its constitution and Rule 4.3 and despite this the jury was not instructed on the analysis to apply to this evidence.

In instructing the jury, the trial court instead provided the jury with a unique, quixotic "rule of reason" instruction stating merely that the antitrust laws do not leave a jury "free to consider every possible benefit that Rule 4.3 may have . . ." 32 TR.2d 7216. The instruction given was derived from an out-of-text quotation from *Professional Engineers* which had the effect of compounding the prejudicial impact of the refusal to instruct on public service considerations. By instructing the jury that it was not free to consider "every possible benefit" of the rule, the trial court led the jury to believe it *could not* consider the public interest aspects of the application of the rule

unless it could see a *direct* connection between Rule 4.3 and an increase in competition. The trial court refused to instruct the jury that public service factors could be *indirect* pro-competitive factors that could be considered "differently" than other business practices despite the fact that this Court has stated it is "unrealistic" not to consider practices that have public service aspects differently than ordinary business practices. *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 687, *quoting, Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 788-89, n.17.

On the whole the trial court's instructions grossly misrepresented the "rule of reason" cognizance of pubic service considerations. Even in *Professional Engineers,* when the Court stated that the rule "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," [*National Society of Professional Engineers v. United States, supra,* 435 U.S. at 688], the Court reaffirmed that the rule is open to consideration of public service aspects and that such practices are to be judged differently than ordinary business. *Id.* at 687.

The Court of Appeals upheld the refusal to instruct regarding public service aspects of the rule of reason on the grounds that only "procompetitive" benefits could be considered.[8] (App. A, p. 30a.)

The Court of Appeals held that in any event, since counsel were permitted to argue that public service could be pro-competitive, the instruction was unnecessary. (App. A,

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[8]The only guidance from the trial court in the public interest area actually compounded the Court's error. The jury was instructed that Los Angeles had a "legitimate public interest" in the acquisition of a professional football team sufficient to justify the expenditure of public money.

p. 30a.) This ruling is contrary to the law of the Ninth Circuit, [*see, Boddicker v. Arizona State Dental Ass'n., supra,* 549 F.2d 626], and erroneous under *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 687.

Contrary to the Court of Appeal's opinion (App. A., p. 30a), argument of counsel is an unheard-of substitute for proper instructions from the court. In fact, the other instructions given warn the jury that they could not accept argument of counsel on a par with instructions as to issues of law.

The errors in instructions in this case must be corrected. This case presents ideal facts for the Court to properly define the role that public interest should have in a rule of reason analysis.

2. The "Rule Of Reason" Instruction To The Jury Ignored The Interests Of Northern California Consumers

This Court has consistently identified consumer welfare as the principal goal of antitrust policy. For example, in condemning the television plan challenged in *NCAA v. Board of Regents of Univ. of Oklahoma,* ..... U.S. ....., 82 L.Ed.2d 70 (June 27, 1984), the Court held that the agreement was "unresponsive to consumer preference. This . . . point is perhaps the most significant since 'Congress designed the Sherman Act as a "consumer welfare prescription." ' " *Id.* at 87-88, *quoting, Reiter v. Sonotone Corp.,* 442 U.S. 330, 343, 60 L.Ed.2d 931 (1979).

In this case, any competitive effects of preventing a Raiders move to Los Angeles were at least offset by the competitive effects of maintaining the Raiders in Northern California, where for 21 seasons they had operated within seven miles of the San Francisco 49ers. Any projected business competition between the Rams and the Raiders was already taking place between the Raiders and the 49ers

in Northern California. Any competition created by the move to Los Angeles came at the expense of suppressing an equivalent amount of competition in the Bay Area. Thus, to the extent that those who consume the NFL product in the Los Angeles area benefit from direct competition between the Raiders and the Rams, those who consume the NFL product in Northern California lost the benefits of direct competition between the Raiders and the 49ers.[9]

The trial court, however, refused to instruct the jury that it could consider the extent to which the increase in Rams-Raiders competition was offset by the decrease in 49ers-Raiders competition. CR 2042 at 3-4, Attachment D. While the Court of Appeals dismissed this as "a fact question that could be argued to the jury" (App. A., p. 30a), it was legal error to fail to instruct the jury on the central legal significance of such evidence. As the Court said in *NCAA v. Board of Regents of Univ. of Oklahoma, supra,* 82 L.Ed.2d at 84, an overall assessment of a restraint's competitive effects is required, and "a restraint in a limited aspect of a market may actually enhance marketwide competition."

Similarly, the Court of Appeals disregarded the effect on competition in Northern California and found the restraint imposed by NFL Rule 4.3 unreasonable because it prevented "direct competition between the Rams and Raiders [which] would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area." (App. A, p. 23a.)

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[9]The District Court recognized the fact that competition was not unique to Southern California:

> "At present, the location of the San Francisco Forty-niners vis-a-vis the Oakland Raiders . . . suggests that these . . . teams compete for dollars found in the pockets of football fans." *Los Angeles Memorial Coliseum v. N.F.L.,* 468 F.Supp. 154, 163 (C.D. Cal. 1979).

This antitrust law requires more than a tunnel-vision focus on the interests of Los Angeles-area consumers. Without an assessment of the effect of the NFL's location decision on the interests of Northern California consumers, no accurate determination of Rule 4.3's impact on competitive conditions could be made. Moreover, by focusing *only* on the effects of the league agreement in Southern California, the lower courts ignored this Court's mandate that an essential element of every Sherman Act violation is a restraint on commercial competition as opposed to a restraint merely on the activities of any one competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L.Ed.2d 510 (1962).

Nothing in the Sherman Act favors competition in Southern California over competition in Northern California. The result below, however, is entirely predicated on the assumption that the competitive effects in one location can be divorced from the *identical competitive effects* in another directly affected market. This Court has repeatedly rejected such an approach. *NCAA v. Board of Regents of Univ. of Oklahoma, supra*, 82 L.Ed.2d at 84; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L.Ed.2d 568 (1977). Although repeatedly urged both at trial and to the Court of Appeals, this fundamental antitrust principle was squarely rejected by the courts below.

Whatever may be necessary to instruct a jury in a normal case, in this trial where a Southern California jury was required to assess the competitive effects of a challenged practice in both Northern and Southern California, it was essential for the trial court to instruct on the issue. It was also fanciful to expect a Los Angeles jury to consider the interests of Bay Area consumers in the absence of specific guidance from the trial judge.[10]

[10]Moreover, in its charge to the jury, the trial court specifically noted Respondents' contention that "the relevant geographic market is the Los Angeles metropolitan area." 32 Tr.2d 7213.

3. As a Matter of Law, the Location of League Teams According to a League Bylaw Provision Cannot Be Deemed a Violation of Section 1 of the Sherman Act

The courts below wrongly viewed the NFL as merely a form of voluntary "cooperation" among otherwise independent business competitors. But the reality, as Justice Rehnquist has recognized, is that the very nature of a sports league product *requires* joint production in unified action:

> "The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market." *National Football League v. North American Soccer League,* 459 U.S. 1074, 1077, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting from denial of certiorari).

Every other Court of Appeals to review NFL operations has concluded that the League is a lawful joint venture and not a collection of business competitors.[11] By contrast, the majority below held that the NFL was nothing more than "an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act." (App. A, p. 12a.) As the dissent noted, "[t]he majority's holding places the Ninth Circuit's ruling *in conflict with every other circuit to consider this issue.*"[12] (App. A, p. 42a.) (emphasis supplied).

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[11] *See, e.g., North American Soccer League v. National Football League,* 670 F.2d 1249, 1251 (2nd Cir.), *cert. denied,* 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C. Cir. 1978); *Mackey v. National Football League,* 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

[12] In treating the NFL as merely an association of 28 independent business competitors, the lower courts expressly relied on cases disapproved and overruled by this Court in *Copperweld Corp. v. Independence Tube Corp.,* ... U.S. ..., 81 L.Ed.2d 628 (June 19, 1984).

The members of the NFL do not exist or operate independent from the League itself, and the courts below plainly erred in holding that individual League members can produce a product. No individual club can produce a single game, let alone a season of NFL football and an annual postseason tournament. As Judge Williams explained:

> "The product distributed by the member clubs is not analogous to ball bearings, mattresses, or groceries, because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sandlot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of 'separate business entities whose products have independent value' banded together in *de facto* cartel." (App. A, pp. 46a-47a.) (citations omitted).

That the value of a sports team depends entirely on that team's membership in a league is evident from the positions of the Oakland Coliseum and the Los Angeles Coliseum. Both wish to have *NFL Football.* The difference in their positions is that the Oakland Coliseum recognizes that the only party that can sell league entertainment is the League itself which operates as "a single unit competing as such with other similar professional leagues." *San Francisco Seals, Ltd. v. National Hockey League,* 379 F.Supp. 966, 970 (C.D. Cal. 1974). By contrast, the Los Angeles Coliseum seeks to transform a league into something it is not, and to secure the league product by dealing with only one league member.

Within a professional sports league, the members act as partners or joint venturers who must necessarily agree on many aspects of their joint activities, *including* where their operations will take place. The Oakland Coliseum so recognized this in its dealings with both the AFL and

the NFL, as well as major league baseball. In each instance, the Oakland Coliseum sought a *league* grant of a team franchise. *Nahas,* 28 Tr.2d 6228-29. The dissenting opinion in the Ninth Circuit opinion recognized that the Raiders have challenged only one aspect of a larger agreement:

> ". . . [E]mphasis upon . . . legal formalisms obscures the reality of life in the N.F.L. . . . The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit." (App. A, p. 40a.)

This principle has been recognized in numerous other business contexts. Agreements limiting internal competition among participants in a common enterprise are commonplace, particularly among partnerships such as law firms. No law firm would be required to allow its partners to compete with one another for clients, office space, or the services of staff members.[13] These and similar restraints are inherent in the formation of a partnership or joint venture relationship and have never been regarded as subject to attack under Section 1. *See, e.g., United States v. Addyston Pipe and Steel Company,* 85 F. 271, 280 (6th Cir. 1893), *aff'd. as modified,* 175 U.S. 211 (1899).

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[13]A leading commentary, described by the majority below as "persuasive," (App. A, p. 13 n.4), has suggested that a sports league should be regarded as the equivalent of a law firm partnership for Section 1 purposes. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model,* 82 Mich. L. Rev. 1, 5 (1983). *See also,* Weistart and Lowell, *The Law of Sports,* § 5.11 at 757-58 (1979).

A league does not exist to foster internal business competition among the league members. The Raiders were not issued a franchise by the American Football League in 1960 to engage in business competition with the other AFL members, but instead to further that League's joint business operations. When the Raiders encountered early financial difficulties, the other AFL clubs contributed funds to strengthen the club, worked to secure improved stadium facilities, and sought to preserve the Raiders' operations in Oakland. These are not the actions of business competitors seeking to put one another out of business, but rather of partners in a common business venture. Similarly, when the Raiders were extended an NFL franchise as a result of the NFL-AFL merger, they were not admitted to compete economically with the other NFL clubs, but rather to contribute to the NFL's joint business operation.

CONCLUSION

This case involves legal principles of constitutional dimension that affect cities throughout the United States. Where cities are involved in litigation of this nature—literally pitting Northern California interests against Southern California interests—the trial venue should never be allowed in the home court of either. To do so, as demonstrated, denies the constitutional rights to a representative jury and a jury without financial interest in the outcome.

Section 1 of the Sherman Act was never intended to apply to League decisions regarding franchise locations. The NFL is a lawful joint venture and not a collection of business competitors.

Assuming this case truly involves what was intended by the Sherman Act, then certainly the sixteen Northern California cities that invested millions in the NFL League and the Oakland Raiders can expect the trial court to:

1. Instruct the jury that public service considerations aside from competitive impact must be considered under a "rule of reason" analysis of Rule 4.3.

2. Adequately instruct the jury, it must consider the anticompetitive effect in Northern California as well as the procompetitive effect in Southern California of the Raiders' unilateral move to Los Angeles.

The Court of Appeals' opinion has created havoc in Oakland, Baltimore and around the country by its venue and anti-trust decisions. These decisions demonstrate the need for guidance from this Court. Certiorari should be granted.

Respectfully submitted,

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